

HIGH TECH BROADBAND COALITION



January 23, 2003

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Written Ex Parte
UNE Triennial Review Proceeding
CC Dockets No. 01-338, 96-98, 98-147

Ms. Dortch:

The High Tech Broadband Coalition (“HTBC”)¹ hereby submits this written ex parte for inclusion in the dockets referenced above in response to allegations and inaccuracies in a December 12, 2002, written ex parte filed by WorldCom (“WorldCom ex parte”).² Attached to this filing is a copy of the HTBC’s October 29, 2002 written ex parte, which includes the model rule language at issue (“HTBC ex parte”).³

¹ The HTBC is composed of six trade organizations whose members represent a wide range of high-tech companies. HTBC’s members include the leading trade associations of the computer, telecommunications equipment, semiconductor, consumer electronic, software, and manufacturing sectors.

² See Letter from Kimberly Scardino, Senior Counsel, WorldCom, to Marlene H. Dortch, Secretary, Federal Communications Commission, in *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Service Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, (filed December 12, 2002) (“WorldCom ex parte”).

³ See Letter from Peter K. Pitsch, Director of Communications Policy, Intel, to Marlene H. Dortch, Secretary, Federal Communications Commission, in *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Service Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147 (filed October 29, 2002) (“HTBC ex parte”).

In the WorldCom ex parte, WorldCom alleges that the motivation of the HTBC and the intended effect of its suggested rule changes are to "...limit the availability of advanced services to the public,"⁴ "...limit[] competitive DSL service,"⁵ and ignore the Commission's long standing policy of technological neutrality.⁶ The HTBC strongly disagrees with these assertions and assumptions and hereby responds accordingly.

I. The HTBC Advocates FCC Rule Changes that Will Increase Broadband Availability, Competition, and Affordability.

The HTBC represents the leading trade associations of the computer, telecommunications equipment, semiconductor, consumer electronic, software, and manufacturing sectors. The HTBC specifically excludes carriers, whether competitive or incumbent, in order to provide the FCC with an objective viewpoint from the broadband "value chain" that is distinct from the often-polarized debate among the various classes of carriers. The HTBC submitted Comments⁷ and Reply Comments⁸ in the Commission's Triennial Review due to the continuing decline in carrier capital expenditures,⁹ the lack of sufficient broadband investment, and the impact this decline is having on research and development and innovation in the United States.

In its filings, the HTBC has advocated that the Commission determine that Section 251 unbundling obligations do not apply to new, last-mile broadband facilities, including all fiber, remote terminals, and DSL (and successor) electronics deployed on the customer side of the central office.¹⁰ Such a ruling will remove the current regulatory disincentives that are adversely affecting the capital investment plans of the ILECs.¹¹ The HTBC has

⁴ *WorldCom ex parte* at 2.

⁵ *WorldCom ex parte*, at 3.

⁶ *WorldCom ex parte*, at 2.

⁷ See Comments of the High Tech Broadband Coalition in *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Service Offering Advanced Telecommunications Capability*, CC Dockets Nos. 01-338, 96-98, 98-147 (filed April 5, 2002) ("HTBC Comments").

⁸ See Reply Comments of the High Tech Broadband Coalition in *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Service Offering Advanced Telecommunications Capability*, CC Dockets Nos. 01-338, 96-98, 98-147 (filed July 17, 2002) ("HTBC Reply Comments").

⁹ Capital expenditures for the industry have declined from \$113 billion in 2000, to \$93 billion in 2001, to an estimated \$51 billion in 2002. See James P. Parmelee, *Telecom Equipment – Wireline Update* at 2, Credit Suisse First Boston, June 26, 2002.

¹⁰ *HTBC Comments, passim; HTBC Reply Comments, passim.*

¹¹ See John Haring and Jeffrey H. Rolfs, *The Disincentives for ILEC Broadband Investment Afforded by Unbundling Requirements* (July 16, 2002) ("Haring & Rolfs Study"), attached as Appendix A to *HTBC Reply Comments*. See Also, Cambridge Strategic Management Group, *Assessing the Impact of Regulation on Deployment of Fiber to the Home: A Comparative Business Case Analysis* (Apr. 5, 2002) ("Corning Study"), attached as Exhibit I to Comments of Corning, Inc., in *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of*

legally justified this finding under the §251 “impair” analysis as described in the UNE Remand Order,¹² the Commission’s obligation to encourage the deployment of advanced services in §706 of the Act,¹³ the forbearance authority provided to the Commission in §10 of the Act,¹⁴ as well as the interpretation of the D.C Circuit in *United States Telecommunications Association v. FCC*.¹⁵ The HTBC proposes a balanced approach that will increase the deployment of broadband infrastructure while maintaining significant safeguards to ensure continued competitive access that will promote widespread broadband deployment.¹⁶

In addition to these filings, on October 29, 2002, the HTBC filed proposed changes to Section 51.319 of the Commission’s rules¹⁷ that would implement the policies advocated by the HTBC.¹⁸ *Today, we suggest minor changes to that language to clarify that all existing non-packet loop capabilities, not just voice grade equivalent channels, would remain available to the competitors under the HTBC’s proposed rules.* Thus, the HTBC’s model rule would implement the unbundling changes advocated in its filings and would essentially hold the CLECs “harmless” by mandating continued collocation rights, access to existing copper loops, and non-packet loop capabilities over copper. The HTBC also advocates that hybrid fiber/copper loop facilities continue to be available to CLECs, including high capacity UNEs, e.g. DS-1s, subject to Commission determinations with respect to “impairment.”

II. WorldCom’s ex parte Inaccurately Portrays the HTBC’s Positions.

The HTBC hereby responds to some of the statements made in the WorldCom ex parte concerning the HTBC’s filings and model rule language.

- “The result of HTBC’s proposal would be to allow competitors access to copper loops, but not to fiber-fed loops.”¹⁹ The HTBC proposal would provide CLECs with continued access to their present customers by maintaining unbundling obligations on copper loops, entitling CLECs with access to non-packet loop capabilities when the ILEC upgrades an existing DLC system, and with access to the fiber at the SAI, and, upon site specific requests, engineered splices near the remote terminal. The HTBC proposal also prohibits the ILECs from retiring the existing copper loop absent permission from the Commission.

the Telecommunications Act of 1996, Deployment of Wireline Service Offering Advanced Telecommunications Capability, CC Dockets Nos. 01-338, 96-98, 98-147 (filed April 5, 2002).

¹² See, *HTBC Reply Comments*, 19-21.

¹³ *Id.*, 29-35.

¹⁴ See, *HTBC Comments*, at 45-48.

¹⁵ *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (“USTA”).

¹⁶ See, *HTBC Reply Comments*, at 3.

¹⁷ 47 CFR §51.319(a).

¹⁸ See, *HTBC ex parte*.

¹⁹ *WorldCom ex parte*, at 2.

- “Moreover, despite the repeated claims by the incumbent LECs and their allies, there is no record evidence that regulatory constraints have affected the pace of deployment of advanced services.” To the contrary, the HTBC has included substantial evidence that the current regulatory environment has constrained investment in new broadband networks. The chilling effect of unbundling on new broadband investment was demonstrated by SBC’s cessation of new broadband investment in Illinois when the Illinois Commerce Commission required these facilities be unbundled.²⁰ In the study attached to the HTBC’s Comments in the Triennial Review, the authors concluded that the Commission’s present unbundling requirements could stifle ILEC investment by at least \$6 billion and possibly \$20 billion.²¹ In its Comments in the same proceeding, Corning, Inc., filed a study that concluded penetration of fiber-to-the home service would accelerate six fold over 10 years if unbundling regulations were relieved.²² Finally, the impact of these regulations is clearly evidenced by the increased investment of the cable modem providers simultaneous to the significant decreased investment by the ILECs in their broadband networks.²³
- “[The HTBC proposal] ignores the Commission’s longstanding policy of technological neutrality[.]”²⁴ Sound competitive policy should trump concerns about technological neutrality. The distinction with new technology arises because the ILECs’ new broadband investment using packet-based technology is competing directly with cable modem investment. Also, for these new investments the ILECs have no unfair advantages over the CLECs. Therefore, in fashioning unbundling policies under the necessary and impair standards of Section 251, a sound basis exists for the Commission to distinguish between the ILECs’ new last mile packet based investments and their legacy facilities. In fact, the Commission has a legal obligation to distinguish between those network elements used to provide broadband services compared to those deployed to provide telecommunications services.²⁵ Furthermore, another recent D.C. Circuit decision upheld the Commission’s statutory authority to make service-based distinctions for network elements.²⁶

²⁰ See, *HTBC Comments*, at fnnt. 108 (citing Letter from Edward E. Whitacre, Jr., Chairman and CEO, SBC Communications, Inc., to the Honorable J. Dennis Hastert, Speaker, U.S. House of Representatives, at 1 (Mar. 14, 2001)).

²¹ See, *Haring & Rolfs Study*.

²² See, *Corning Study*.

²³ While telecommunications capital investment declined by more than 54% from 2000 through 2002, cable industry infrastructure expenditures increased by more than 13% during the same time period. See, http://www.ncta.com/industry_overview/indStats.cfm?statID=23 (visited Jan. 21, 2003).

²⁴ *WorldCom ex parte*, at 2.

²⁵ See, *USTA* 290 F.3d at 428 (vacating and remanding Line Sharing Order because the Commission failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite)).

²⁶ *Competitive Telecommunications Association v. Federal Communications Commission*, 309 F.3d 8 (D.C. Cir. 2002) (supporting the Commission’s use of service-by-service restrictions on unbundled network elements).

- “[The HTBC proposal] would limit the availability of advanced services to the public.”²⁷ The HTBC believes that regulatory relief and inter-modal competition will maximize the availability and quality of broadband services to the public. The Commission and the courts have recognized that a distinct broadband market exists in which various platforms compete and the cable modem providers currently maintain a dominant market position.²⁸ Unless regulatory relief is provided, ILEC investment will be suppressed and the market dominance of cable modem providers likely will increase.²⁹
- “Additionally, because Remote Terminal-based Digital Subscriber Line Access Multiplexers (“DSLAMs”) are closer to the customer than central office-based DSLAMs, the incumbent LECs would be able to offer more attractive service offerings with higher data rates than competitive LECs would be able to offer without access to fiber-fed loops.”³⁰ The HTBC proposal is targeted to new investment in the broadband market. Any advantage the ILEC receives from this new investment is not unfair; rather it promotes facilities-based investment and competition and increases broadband availability and quality. Such investment will be extremely risky and will not be made unless the ILECs have a reasonable expectation of a return on this investment. In its Comments, the HTBC cited a recent study that concluded up to \$300 billion would have to be invested to create a robust broadband network.³¹ The Commission itself acknowledged that investment in new markets is risky and that demand for advanced services would be difficult to predict.³² Heightened and unclear regulations placed on the ILECs’ broadband networks has compounded this risk and resulted in decreased investment, deployment, and quality of service.
- “Thus, if competitive LECs are denied access to these facilities, customers located more than 18,000 feet from the CO will not, as a practical matter, be able to choose a competitive LEC as their service provider.”³³ Under the HTBC’s proposal, CLECs will have access to all existing copper loops, and in cases where a DLC system is upgraded with a fiber feed, the ILEC must provide existing non-packet loop capabilities to the CLEC. For broadband services, HTBC’s position is that alternative platforms available to the CLECs justify unbundling relief under both the *UNE Remand* standard and the *USTA* interpretation of Section 251. Moreover, CLECs certainly can invest in their own wireline facilities to supplement the existing loops.

²⁷ *WorldCom ex parte*, at 2.

²⁸ See, *HTBC Comments*, at 21 (citing to AOL Time Warner Order’s discussion of the multiple platforms for “high-speed Internet access service,” and a similar discussion in the Commission’s Eighth Annual Report on Video Competition).

²⁹ As of June 2002, DSL accounted for 31% of High-Speed Lines in the U.S., whereas Coaxial Cable provided 56% of these lines. See, *High-Speed Services for Internet Access: Status of June 30, 2002*, Federal Communications Commission (released Dec. 17, 2002).

³⁰ *WorldCom ex parte*, at 4.

³¹ See, *HTBC Comments*, at fn. 97 (citing to study that estimates construction and deployment of a nationwide broadband network will cost between \$270 and \$300 billion).

³² *UNE Remand Order*, 15 FCC Rcd at 3838.

³³ *WorldCom ex parte*, at 4.

- “The FCC should find that competitors are impaired without access to ... packet transport to and from the RT.”³⁴ In its proposal, the HTBC provides for a non-packetized voice channel to the CLEC. A finding that the CLEC is “impaired” without access to the packetized transport, including broadband services provided over that loop, would be contrary to the D.C. Circuit’s holding in *USTA*, which recognized the existence of multiple broadband platforms and vacated the Commission’s line sharing rule.³⁵ Furthermore, the entitlement advocated by Worldcom would provide a disincentive to ILECs to make the investment in the fiber feed to the RT, thus retarding broadband investment contrary to the Commission’s obligations under §706 of the Act.

If you have any questions concerning this filing or the HTBC in general, please do not hesitate to contact the undersigned. Thank you.

Sincerely,

/s/ Derek Khlopin

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³⁴ *Worldcom ex parte*, at 5.

³⁵ *See, USTA, passim.*

HTBC
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Attachment 1: HTBC ex parte (Oct. 29, 2002)